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ABSTRACT

In addition to organizational liability, deans and department chairs can be held personally liable for their actions in certain circumstances. To avoid liability from hiring and firing employees and responding to complaints of sexual harassment, the two major areas in which deans and department chairs are often involved, strategies and guidelines should be developed. Two areas of concern in hiring and firing employees are contractual issues and discrimination issues. To avoid litigation arising from a hiring situation, job-related criteria upon which to evaluate applicants must be identified. Applicants must be evaluated against the same criteria, avoiding the use of illegal factors such as race, gender, age, and disability. In addition, employment offers should be written, clearly identifying the contractual agreement. To avoid litigation arising from a firing situation, employees should be given adequate notice regarding performance and expectations and communication regarding performance issues should be documented. To avoid or minimize the liability resulting from sexual harassment complaints, the complaint and facts should be documented and treated seriously. The employee or student must be informed of the institution's sexual harassment policy and assured of an investigation. Finally, human resource personnel must be notified and appropriate corrective action must be enforced where there is evidence of sexual harassment. (TGI)

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ENLIGHTENING CHAIRS AND DEANS ABOUT LIABILITY:

HOW TO AVOID EMPLOYMENT LITIGATION

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CYNTHIA J. HASTON

EXPERIENCE

Cynthia J. Haston is an employment law consultant from Danville, CA. Ms. Haston provides employment law advice, research and training services to various public and private sector organizations.

From January 1991 to May 1995, Ms. Haston was an Assistant General Counsel for the Maricopa County Community College District (MCCCD) located in the greater Phoenix area. MCCCD is the second largest community college district in the United States and consists of ten (10) colleges, a Skill Center and a District Support Office. Each year, 180,000 students attend an MCCCD college and the District employs 8,000 full and part time employees.

At MCCCD, Ms. Haston was responsible for:

providing advice on eeo/employment issues to all levels of administration;

investigating and responding to all internal and external discrimination charges;

representing the District at agency hearings and compliance reviews;

coordinating with, and providing litigation support to, outside counsel on all employment related cases;

developing and presenting all training related to EEO, employment law and affirmative action;

developing, maintaining and disseminating the Affirmative Action Plan and all related reports.

From 1985 to 1991, Ms. Haston was employed in the private sector at Goodyear Aerospace/Loral Corporation as an EEO and Labor Relations manager. At GAC/Loral, Ms. Haston's responsibilities included: defending Loral on all agency filed discrimination charges; AAP development; advising management regarding EEO and employment law; all EEO training; reviewing all layoff decisions for compliance with non discrimination laws and the WARN Act; union contract negotiation and assisting outside counsel in litigation support.

Ms. Haston began her career in the field of EEO as an Investigator for the Ohio Civil Rights commission in 1981.

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INTRODUCTION

Although Deans and Department Chairs are often members of faculty, in the eyes of the courts, they are considered managers/administrators when executing their administrative duties; thus, their decisions can legally bind the institution. In addition to creating organizational liability, Chairs and Deans can be held personally liable (civilly and criminally) for their actions (or inaction) in certain circumstances. The focus of this paper will be on identifying strategies to avoid liability in two major areas where Chairs are often involved in employment litigation: hiring/firing of employees; and responding to complaints of sexual harassment.

THE EMPLOYMENT RELATIONSHIP: HIRING AND FIRING

In hiring and firing employees there are two areas of concern for the Department Chair: contractual issues and discrimination issues. Employment contract issues generally go straight to arbitration or court for enforcement whereas alleged discrimination in hiring/firing is initially handled by an administrative agency, such as the Equal Employment Opportunity Commission (EEOC) or Department of Education -- Office for Civil Rights (OCR). Contract issues are decided on what was actually communicated to the applicant (either expressly or implied and either verbally or in writing) whereas discrimination issues are more often decided on comparative evidence (i.e. how the minority applicant was evaluated/treated compared to the non-minority applicant and /or the overall hiring or termination patterns of the institution).

Hiring Employees

Most institutions have formal interviewing and hiring processes, at least for full time instructors. The hiring process starts with an open position; thus, it is imperative to identify up front the qualifications and experience necessary for the person to succeed in the job. All applicants should be compared against the same job related criteria. The Chair should document to his/her file the exact criteria that he/she was looking for in the ideal candidate. The Department Chair or screening committee should note the reasons an applicant was (or was not) chosen for further consideration or hire. Notations should be made on each applicant. Often we only associate receiving discrimination charges from those unsuccessful applicants for regular full time employment; however, there has been a substantial increase in the number of complaints filed by applicants for part time instructor positions. This is particularly problematic where the hiring processes for part time instructors are less formal than those for hiring full time instructors. Although your institution's process may be less formal for hiring part time instructors and thus, you many not be required to keep documentation as an institutional practice; EEOC will require you to fully respond and justify your hiring decisions for part time instructors.

Strategies to avoid litigation arising from a hiring situation:

1. Identify job related criteria upon which to evaluate applicants.
2. Evaluate all applicants against the same criteria.
3. Ask job related questions in the interview--avoid questions based on illegal factors such as race, gender, age, disability.

   (e.g. If attendance is an issue, you can ask the person about their attendance at a previous job and you can verify their answer in a reference check. It would be inappropriate gender discrimination to ask the mother of small children about her child care arrangements as a method to determine her potential attendance.).

4. Make notes based on your interview or resume screening, specifically noting why an applicant was not chosen (e.g. insufficient experience in teaching labs).
5. Keep documents (resumes, your notes, etc.) for one (1) year from the date of application
6. Always date and sign your notes. Make the notes contemporaneous with the hire decision. Your notes are known as "source" documents and are very valuable in defending discrimination charges.
7. Keep notes to document your hiring decisions for part time faculty as well as full time faculty.
8. Do not refuse to hire someone because they have previously filed a charge against the institution -- this would be unlawful retaliation. You must be able to prove that you made the hiring decision on legitimate job related reasons.
9. Consider using electronic data systems to keep track of applicants (date of application, summary of qualifications, positions qualified for, location and schedule preferences etc..)

Offers of employment

1. Avoid making verbal offers.

   "Do you want to teach 101 next semester -- are you available at 8 a.m., please sign and return the enclosed form..."

2. Use a standard written format.

3. Clearly identify the contractual arrangement: i.e. the dates of the contract, that the employment relationship is predicated on sufficient enrollment in the course; that the institution reserves the right to anticipatory breach the contract in the event that good cause is shown (ex. sexual harassment, felony, etc.); and that the relationship is non-continuing in nature.

Firing employees

If an employee is considered "at will", they can be terminated at any time for any legal reason (i.e. can't be discriminatory, Whistleblower, etc.). However, most employees at institutions of higher education are not employees at will -- they are often employed for a specific contractual period of time or there is an implied contract for continued employment. A probationary employee has less rights than a regular, full time (never say permanent!) employee. Probationary employees can be terminated within or at the end of their probationary period, generally without recourse (if the termination is based on non-discriminatory, non-public policy [Whistleblower] reasons). For public employers, just cause must be shown in order to terminate a regular, full time employee. In order to support a just cause termination (and prevail at a due process hearing on that issue), it is imperative that the department chair be able to demonstrate (document) that he/she advised the employee of the behavior that needed to be improved and that the behavior did in fact not improve.

Strategies to avoid litigation arising from a firing situation:

1. Give the employee adequate notice regarding his/her performance and your expectations.

2. Document all communication regarding performance issues. Follow up verbal conversations with a written note to the employee or (at the very least) a note to your file or on your calendar. Date and sign all documentation.

3. Keep copies of all documents that support your evaluation of the employee's performance (i.e. copies of documents where mistakes were made, documents which show plagiarized work, etc.).

4. Keep copies of complaints that you received from colleagues and/or students that support your evaluation of employee's performance.

5. Keep documentation for at least two (2) years after the employee is terminated.

SEXUAL HARASSMENT

Anita Hill & Clarence Thomas...Tailhook... Jenny Craig..."Disclosure"...

Hardly a week goes by that the issue of sexual harassment is not in the news. The number of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) has more than doubled within the past two years. Institutions of higher education have promulgated policies and procedures to address this issue as it relates to students, staff and faculty. What are the responsibilities of a Department Chair in responding to complaints of sexual harassment and/or ensuring that the employment environment is free from sexual harassment?

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Sexual harassment is illegal when: 1) submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment or academic advancement; 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions or academic decisions affecting an individual; or, 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile or offensive working or academic environment.

The courts have recognized two (2) types of sexual harassment in the workplace, **Quid Pro Quo** and **Hostile Environment**. Quid pro quo harassment occurs where submission to sexual conduct is made a condition of an individual's employment. Quid pro quo harassment generally occurs between a manager and a subordinate or between a faculty member and a student. If a charging party can show that quid pro quo harassment existed (i.e. sleep with me or you will lose your job), the institution is strictly liable. Strict liability means that the institution has no defense to the charges of sexual harassment -- they are absolutely liable. This type of liability can attach even if the institution did not have knowledge of the harassment. Further, a single episode of quid pro quo harassment can trigger employer liability.

Hostile environment harassment is defined as unwelcome, pervasive and continuous sexual conduct and commentary which creates an intimidating, hostile, or offensive work environment. The sexual conduct or commentary must be pervasive -- an isolated offensive sexual comment is insufficient to establish liability. In a case alleging hostile environment sexual harassment, whether or not an institution will be liable is determined by the employer's knowledge and appropriateness of response. Thus, it is imperative for Department Chairs to be knowledgeable of their institutional policy and procedure regarding complaints of sexual harassment. The EEOC has stated that an employer's response to complaints of sexual harassment must be immediate and appropriate. Failure to take appropriate action in response to sexual harassment complaints will ensure that the institution will be liable.

In the area of sexual harassment complaints, more and more plaintiffs are naming individual administrators for failing to adequately follow up on complaints of sexual harassment. If the administrator knew or should have known of the sexual harassment and did not appropriately respond, then he/she could be held personally liable for his/her negligence and any harm that resulted therefrom. Additionally, in community property states, the spouse of the individually named defendant-department chair is also often named in the lawsuit. While liability can attach to individual administrators, most institutions will provide defense counsel for their administrators if the administrator was acting in accordance with policy (i.e. within the scope of his/her duties). By far, the most potential for individual liability comes from the situation where the administrator is actively involved in or initiated the sexual harassment. In those cases, civil liability will most certainly attach and criminal liability may also attach depending on the type of sexual harassment (i.e. sexual touching which may constitute a sexual assault) proven by the plaintiff.

How to avoid or minimize liability resulting from sexual harassmen complaints

1. Treat the complaint seriously.
2. Get the facts, take notes. Who, what, when, where.
3. Focus on the behavior/facts (avoid "yes, but"...statements)
4. Inform the employee of the institution's sexual harassment policy (serious issue, confidentiality, retaliation prohibited, false claims prohibited).
5. Assure the employee that you (and/or the resource person) will investigate his/her complaint and follow up with them by a specific date.
6. Ask the employee what type of resolution he/she is looking for.
7. If the employee does not want anything done--let the employee know that you have to inform the resource person and that if sexual harassment exists the institution must legally address the issue once an administrator knows or should have known about the issue.
8. Contact your resource person. Follow all proper policies and procedures.
9. Take appropriate corrective action where there is evidence of sexual harassment.
10. DOCUMENT EVERYTHING THAT YOU HAVE DONE AND MAINTAIN YOUR FILE FOR AT LEAST TWO YEARS. Coordinate with your resource person regarding the maintenance of files past two years.
11. Monitor workplace/academic environment: equal participation; sexual innuendo and comments; jokes; graphics/posters/software.